

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 1679 of 2000

with

CIVIL APPLICATION No 7467 of 2000

with

FIRST APPEAL No 1680 of 2000

with

CIVIL APPLICATION No 7471 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT

and

Hon'ble MR.JUSTICE K.M.MEHTA

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : YES
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : YES

SARDAR SAROVAR NARMADA NIGAM LTD. C/O EXECUTIVE ENGINEER

Versus

AARTI STEEL INDUSTRIES C/O AJITBHAI M VAISHVIKAR

Appearance:

1. First Appeal No. 1679 of 2000
MR GC MAZMUDAR for Petitioner
MR DC DAVE for Respondent No. 1
 2. First Appeal No 1680 of 2000
MR GC MAZMUDAR for Petitioner
MR DC DAVE for Respondent No. 1
-

CORAM : MR.JUSTICE J.N.BHATT

and

Date of decision: 26/09/2000

CAV JUDGEMENT

(Per : MR.JUSTICE K. M. MEHTA)

1. Sardar Sarovar Narmada Nigam Limited - Appellate (original respondent) has filed these First Appeal Nos.1679 of 2000 and 1680 of 2000 under section 39 of Arbitration Act, 1940 (hereinafter be referred to as the Old Arbitration Act) against the judgment and decree passed by the Civil Court (Senior Division) at Vadodara in Civil Miscellaneous (Arbitration) Application No.255 of 1999. The trial court by the impugned judgment and decree please to confirm the award of the arbitrator under section 14(2) of the old Arbitration Act filed by Aarti Steel Industries-respondent (original claimant). The trial court confirmed the award dated 15th June, 1999 passed by Arbitrator in this behalf.

2. The relevant facts of these appeals are as under:-

2.1 Aarti Steel Industries, the present respondent (original claimant) entered into a contract for supply and erections, etc. for Sardar Sarovar Dam purpose with the present appellant. The respondent could not supply and carry on the job in time though some more extended time was granted. Ultimately, the appellant terminated the contract on or about 2nd June, 1995.

2.2 The Clause-28 which provides for Arbitration between the parties, reads as under :-

All disputes or differences in respect of which the decision has not been final and conclusive shall be referred to arbitration to a sole arbitrator appointed as follows:

Within thirty days of receipt of notice from the Bidder of his intention to refer the dispute to arbitration, the Chief Engineer, Distribution Network-i, Vadodara shall send to the Bidder a list of the officers of the rank of Superintending Engineer or higher, who have not been connected with the work under this Contract. The Bidder shall within fifteen days of receipt of this list, select and communicate to the Chief Engineer, Distribution Network-1, Vadodara the name of the Officer from the list who shall then

be appointed.

3. As the differences or dispute arose between the original claimant and original respondent. The respondent, therefore, preferred a reference application before the Gujarat Public Works Contract Disputes Arbitration (hereinafter be referred to as the Tribunal at Ahmedabad) somewhere on 4th July, 1995. The respondent, thereby commenced the Arbitration proceedings under the relevant Act before Tribunal. The tribunal, after receiving the said application issued notice to the original respondent (appellant herein). The appellant (original respondent) filed his reply to the said application somewhere on 18th September, 1995. Thereafter, the Tribunal at Ahmedabad by its order dated 19th April, 1996 pleased to hold that it has no jurisdiction to decide the dispute between the parties, in view of the provision of the said relevant Act. Thereafter, the appellant has also filed review application and the Tribunal also passed an order dated 19th April, 1999 and please to reject the review application.

4. Thereafter, the respondent addressed a notice dated 19th April, 1996 to the appellant under the provision of the Old Act to appoint an arbitrator. Therefore, the Arbitrator was appointed in December, 1996. It appears, thereafter, the arbitrator also passed an award on 15/06/1999 and awarded interest at a rate of 20% from 01/08/1995 till the final payment and rejected the counter claim worth Rs.52.79 lacs of the appellant.

5. The appellant, thereafter, filed an application being Civil Application (Arbitration) No.255 of 1999 under section 14(2) of the Old Act to pass a decree in terms of award under the provision of the Old Act. The appellant has also filed a Civil Application (Arbitration) No.324 of 1999 before the Court of learned Civil Judge (S.D.), at Vadodara for setting aside the award of the arbitrator.

6. The learned 7th Joint Civil Judge (Senior Division) by his judgment and decree dated 7th July, 2000 please to allow Civil Miscellaneous Application No.255 of 1999, thereby pleased to award a rule of the Court and passed a decree in terms of the award and dismissed the Civil Miscellaneous Application No.424 of 1999 filed by the appellant (for setting aside the award).

7. Being aggrieved and dissatisfied by the aforesaid judgment and decree dated 7th July, 2000, the appellant,

therefore, filed two appeals being First Appeal No.1679 of 2000 against the order passed in Civil Misc. Application No.255 of 2000 whereas the same is allowed and First Appeal No.1680 of 2000 against the order passed in Civil Misc. Application No.424 of 1999 whereas the same is dismissed that is how two appeals have come to be filed. However, the facts of both the appeals are common and, therefore, I have not separately set out the facts in the second appeal.

8. The learned counsel Mr.C. C. Majmudar for the appellant has further contended that in this case, the parliament has erected Arbitration and Conciliation Act, 1996 (New Arbitration Act) which has been come into effect from 25th January, 1996. Whereas, the learned trial judge has passed a judgment and decree under the provision of Old Arbitration Act, 1940 which is already repealed by the New Arbitration Act and, therefore, also the learned trial Court has no jurisdiction to pass a judgment and decree under the Old Arbitration Act. The learned trial Judge has not considered the submissions of appellant with in Civil Misc. Application No.424 of 1999.

9. Mr.D. C. Dave, learned counsel for the respondent no.1 contended that in this case the arbitrator has passed the award and the learned trial judge has considered all the provision of the Old Arbitration Act and there is no infirmity in the findings of the learned trial judge by making award rule of the Court and, therefore, this court ought not to have interfered with the findings of the learned trial judge.

10. The learned counsel has further contended that in this case, the arbitration proceedings has already commenced before the New Act which came into force on 25th January, 1996 and, therefore, in view of Sec.85 of the New Act, the provision of the Old Act, 1940 will apply and, therefore, the judgment and decree passed by the learned trial judge under the Old Act is legal and valid.

11. Before considering the rival contentions, we will consider the relevant statutory provision in this behalf. The Arbitration Act, 1940, has placed on statue book a uniform law in the subject of arbitration for whole of India and all arbitration. Section 2(a) provides definition of "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or

not. Section 2(b) provides definition of "Award" means an arbitration award. Section 14 provides that award should be signed before it is filed in Court. Section 17 provides of judgment in terms of award. Section 30 provides the grounds of setting aside the award. Section 33 provides procedure for filing an application to contest award passed by the arbitrator. Section 37 provides for limitation. Section 37(3) provides a deeming provision by which an arbitration proceedings commenced which reads as under :-

Section 37 :-

(1) XXXXX

(2) XXXXX

(3) "Section 37(3)

For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement requiring that the difference be submitted to the person so named or designated.

(4) XXXXX

and Section 39 provides for filing of an appeal before this Court against the order of trial court in the certain cases.

12. The Parliament, thereafter has enacted Arbitration and Conciliation Act, 1996, which is hereinafter be referred to as a New Act. The said Act has been conciliation law. Section 21 provides commencement of arbitration proceedings which reads as follows

Sec.21 Commencement of arbitral proceedings. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received

by the respondent.

Section 85 provides Repeal and savings:

(1) The Arbitration (Protocol and Convention) Act 1937, the Arbitration Act, 1940 and the Foreign Awards (Recognition and Enforcement) Act, 1961 are hereby repealed.

(2) Notwithstanding such repeal -

(a) the provisions of the said enactments shall apply in relation to arbitral proceedings which commenced before this Act came into force unless otherwise agreed by the parties but this Act shall apply in relation to arbitral proceedings which commenced on or after this Act comes into force;

(b) all rules made and notifications published, under the said enactments shall, to the extent to which they are not repugnant to this Act, be deemed respectively to have been made or issued under this Act."

13. The learned counsel for the Appellant stated that in this case the proceedings has been initiated and completed under the New Act. He submitted that in this case, the arbitration proceedings were commenced only when the respondent addressed notice dated 19th April, 1996 for appointment of the Arbitrator. According to him in view of sections 21 and 85 of the New Act, the arbitration proceedings in respect of a particular dispute commence on the date on which request for that dispute to be referred to arbitration is received by the respondent (appellant herein) and, therefore, the provisions of the New Act will apply.

14. Mr.D. C. Dave, learned counsel for the respondent has pointed out section 37 of the Old Act as well as section 21 and 85 of the New Act. he submitted that when proceedings were initiated by filing a reference application before the Tribunal somewhere on 4th July, 1995 and, thereafter, appellant filed reply somewhere on 18th September, 1995, the arbitration proceedings were already commenced. He also submitted that all these proceedings were commenced prior to the commencement of the New Act that is prior to 25th January, 1996 and, therefore, the provisions of the Old Act will apply. In support of the said contentions, the

learned counsel for the respondent has relied upon the judgment in the case of M/s.Shetty's Constructions Co. Pvt. Ltd.,Petitioner v/s. M/s.Konkan Railway Construction and another.,Respondents reported in AIR 1999 Supreme Court 1535. The Hon'ble Supreme Court after considering the provision of the New Act in para-(4) has observed as under :-

A mere look to sub-section (2)(a) of Section 85

shows that despite the repeal of Arbitration Act, 1940, the provisions of the said enactment shall be applicable in relation to arbitration proceedings which have commenced prior to the coming into force of the New Act. The New Act came into force on 26/01/1996. The question, therefore, arises whether on that date the arbitration proceedings in the present four suits had commenced or not. For resolving this controversy we may turn to section 21 of the new Act which lays down that unless otherwise agreed to between the parties, the arbitration suit in respect of arbitration dispute commenced on the date on which the request for referring the dispute for arbitration is received by the respondents. Therefore, it must be found out whether the requests by the petitioner for referring the disputes for arbitration were moved for consideration of the respondents on and after 26/01/1996 or prior thereto. If such requests were made prior to that date, then on a conjoint reading of Section 21 and Section 85(2) of the new Act, it must be held that these proceedings will be governed by the old Act. As seen from the aforesaid noted factual matrix, it at once becomes obvious that the demand for referring the disputes for arbitration was made by the petitioners in all these cases months before 26/01/1996, in March and April, 1995 and in fact thereafter all the four arbitration suits were filed on 24/08/1995. These suits were obviously filed prior to 26/01/1996 and hence they had to be decided under the old Act of 1940. This preliminary objection, therefore, is answered by holding that these four suits will be governed by the Arbitration Act, 1940 and that is how the High Court in the impugned judgments has impliedly treated them.

14A. The learned counsel for the respondent has also relied upon the judgment of the Hon'ble Supreme Court in the case of THYSSEN STAHLUNION GABH V/s. STATE AUTHORITY

OF INDIA LID. reported in (1999) 9 Supreme Court Cases, 334. The Hon'ble Supreme Court has observed in para-22 at page 368 are as under :-

For the reasons to follow, we hold :

1. The provisions of the old Act (Arbitration Act, 1940) shall apply in relation to arbitral proceedings which have commenced before the coming into force of the new Act (the Arbitration and Conciliation Act, 1996).
2. The phrase "in relation to arbitral proceedings" cannot be given a narrow meaning to mean only pendency of the arbitration proceedings before the arbitrator. It would cover not only proceedings pending before the arbitrator but would also cover the proceedings before the court and any proceedings which are required to be taken under the old Act for the award becoming a decree under Section 17 thereof and also appeal arising thereunder.
3. In cases where arbitral proceedings have commenced before the coming into force of the new Act and are pending before the arbitrator, it is open to the parties to agree that the new Act be applicable to such arbitral proceedings and they can so agree even before the coming into force of the new Act.

The Hon'ble Supreme Court has also observed in para-23 at page 369 are as under:-

Section 85(2)(a) of the new Act is in two limbs :

(1) provisions of the old Act shall apply in relation to arbitral proceedings which commenced before the new Act came into force unless otherwise agreed by the parties, and (2) the new Act shall apply in relation to arbitral proceedings which commenced on or after the new Act came into force. The first limb can further be bifurcated into two : (a) provisions of the old Act shall apply in relation to arbitral proceedings commenced before the new Act came into force, and (b) the old Act will not apply in such cases where the parties agree that it will not apply in relation to arbitral proceedings which commenced before the new Act came into force.

The Hon'ble Supreme Court has also observed in para-28 at page 372 are as under:-

Section 85(2)(a) is the saving clause. it exempts the old Act from complete obliteration so far as pending arbitration proceedings are concerned. That would include saving of whole of the old Act up till the time of the enforcement of the award. This (sic Thus) Section 85(2)(a) prevents the accrued right under the old Act from being affected. Saving provision preserves the the existing right accrued under the old Act. There is a presumption that the legislature does not intend to limit or take away vested rights unless the language clearly points to the contrary. it is correct that the new Act is a remedial statute and, therefore, Section 85(2)(a) calls for a strict construction, it being a repealing provision. But then as stated above where one interpretation would produce an unjust or an inconvenient result and another would not have those effects, there is then also a presumption in favour of the latter.

15. He has further submitted that in any manner, in this case arbitrator has passed an award, the trial court has made the award the rule of the court and this court has very limited jurisdiction to interfere with the findings of the trial court confirming the award of the arbitrator and for that purpose, the learned counsel for the respondent has relied upon the judgment in the case of Rajasthan State Mines & Minerals Ltd., Appellant v/s. Eastern Engineering Enterprises and Another., Respondents, reported in 1999 (9) S.C.C. 283. The Hon'ble Supreme Court has observed in para-(44) are as under :-

From the resume of the aforesaid decisions, it can be stated that :

- (a) It is not open to the court to speculate, where no reasons are given by the arbitrator, as to what impelled the arbitrator to arrive at his conclusion.
- (b) It is not open to the court to admit to probe the mental process by which the arbitrator has reached his conclusion where it is not disclosed by the terms of the award.
- (c) If the arbitrator has committed a mere error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication then the court cannot interfere.

(d) XXXXX

(e) XXXXX

(f) To find out whether the arbitrator has travelled beyond his jurisdiction, it would be necessary to consider the agreement between the parties containing the arbitration clause. The arbitrator acting beyond his jurisdiction is a different ground from the error apparent on the face of the award.

16. We have considered the rival contentions in this behalf. According to us the arbitration proceedings were commenced when respondent filed an application dated 4th April, 1995 before the Gujarat Public Works Contract Disputes Arbitration Tribunal. These proceedings were initiated prior to coming of the new Act which came into force on 25th January, 1996. We have considered the provisions of the old Act as well as new Act and also the judgment of the Supreme Court in the cases of M/s.Shetty's Construction Co. Pvt. Ltd. v/s. M/s. Konkan Railway Construction and another (Supra) as well as Thyssen Stahlunion GmbH v/s. Steel Authority of India Limited (Supra). In view of fact that the proceedings were initiated prior to coming of the new Act which came into force on 25th January, 1996 and, the provision of the old Act will apply and the provision of the new Act will not apply. Therefore, the contentions of the appellant that the provision of the new Act will apply is rejected.

16A. It may also be noted that the contentions of the appellate that provisions of the new Act will apply, will also have to be rejected on the ground that the appellant had filed a reply before the Gujarat Public Works Contract Disputes Arbitration Tribunal, when it received the notice from the Tribunal under the provision of the old Act and, thereafter, even before the arbitrator, he had participated in the proceedings and, thereafter, the award was declared under the Old Arbitration Act. In fact, before the trial court also, it did not contend that the provision of the new Act will apply. Thus, the appellant has acquiesced in this proceeding under the Old Arbitration Act and, therefore also, it does not lie in the mouth of the appellants, that provision of Old Arbitration Act will not apply and only before us to contend that the provision of the new Act will apply. So in any view of the matter, contention is rejected on the ground that he has participated in proceeding before Arbitrator and Trial Court under the old Act. This contention of respondent is accepted in view of the

judgment of Supreme Court in Prasun Roy v/s. Calcutta Metropolitan Developments Aauthorities, 1987 (4) S.C.C. 217.

17. In our view, over-and-above this contentions, we have gone through the order of the trial court whereby the trial court has confirmed the award of the arbitrator. According to us, the arbitrator has not committed any error of fact or law in reaching his conclusion on the disputed question submitted for his adjudication. In our view, the arbitration has not travelled beyond his jurisdiction and as per the provision of the agreement. There is no any error appeared in the face of the award by the arbitrator.

18. In view of the same we have hereby dismissed both the appeals being First Appeal Nos.1679 of 2000 and 1680 of 2000 filed by the appellant and confirmed the judgment and decree passed by the Civil Judge (S.D.), at Vadodara in Civil Misc. Application (Arbitration) No.255 of 1999. We also dismissed First Appeal No.1680 of 2000 wherein, the learned trial judge has dismissed the Civil Misc. Application (Arbitration) No.424 of 1999. So both Appeals are dismissed with no order as to costs.

(vrp)